No. 92-609

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES OF AMERICA, *Petitioner*,

v.

JERRY J. NACHTIGAL, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether in finding that a jury trial is commanded by Art. III, § 2, Cl. 3 of the Constitution or Jury Trial Clause of the Sixth Amendment because of the severity of the penalties allowed it is sufficient for the lower court not to set forth in detail its reasons therefore in an unpublished decision.

2. Whether Art. III, § 2, Cl. 3 of the Constitution or Jury Trial Clause of the Sixth Amendment requires a jury trial for driving under the influence of alcohol given the panoply of penalties availble pursuant to federal law, including a maximum of five years probation to be served at a community treatment center.

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Stephen Mensel, Esq., on behalf of Jerry J. Nachtigal, respectfully opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit brought by the United States in this case.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article III, § 2, Cl. 3, and the Sixth Amendment of the Constitution; 16 U.S.C. § 3; 18 U.S.C. §§ 3555, 3561(b)(3), 3563(a) and (b), 3571(b) and (d), 3612, 3613, 3614, 3663, 36 C.F.R. §§ 1.3 and 4.24(a)(1) and (2).

STATEMENT

1. On February 15, 1990, the respondent was charged by a two

count information with operating a motor vehicle while under the influence of alcohol in violation of 36 C.F.R. § 4.23(a)(1) and operating a motor vehicle while having a blood alcohol level in excess of .10 gr. per 100 ml. of blood in violation of 36 C.F.R. § 4.23 (a)(2) in Yosemite National Park on September 20, 1989.

2. The Magistrate conducted a court trial and acquitted the respondent of 36 C.F.R. § 4.24(a)(2), operating a vehicle under the influence of .10 gr. of alcohol per 100 ml. of blood, but convicted him of 36 C.F.R. § 4.23(a)(1), operating under the influence of alcohol. Respondent was fined $750.00, ordered to pay a penalty assessment of $10.00, and was placed on terms of unsupervised probation for 1 year.

3. Thereafter, respondent filed his Notice Of Appeal to the United States District Court. The District Court overruled the Magistrate, set aside the conviction, and ordered a jury trial. The government appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the District Court and remanded for jury trial.

4. The Court of Appeals stated that it agreed with the District Court appellate decision and stated as follows:

> On appeal to the district court, Nachtigal [respondent] argued that because of the severity of the potential sanctions, he had a right to a jury trial. The district court agreed, and reversed the conviction.

The Court of Appeals further found the government's position that *Blanton v. City of North Las Vegas*, 489 U.S. 538, 109 S. Ct. 1289 (1989), overruled the court's prior decision requiring jury trials in drunk driving cases in Yosemite National Park was incorrect. It

stated that its prior decision in *United States v. Craner* 652 F.2d 23 (9th Cir. 1981), was still good law even when analyzed according to *Blanton*. It stated that the penalty applicable to the respondent was a "serious" one in *Blanton* terms. It found that based on the harshness of the penalty. It said, "Indeed, the fact that the Secretary [of Interior] imposed the harshest penalty available to him dictates the gravity of drunk driving."

5. The offenses of which respondent was accused exposed him to numerous penalties. The most important of which are as follows:

a. The incarceration provision, 36 C.F.R. § 1.3, sets forth a penalty of up to 6 months incarceration and a $500.00 fine. The fine is increased to a maximum of $5,000.00 by the terms of 18 U.S.C. § 3571(b)(6).

b. 18 U.S.C. § 3561(b)(3) authorizes a term of probation of up to 5 years as an alternative to incarceration.

c. 18 U.S.C. § 3563(a) establishes mandatory conditions of probation which include the following:

i. Not committing another crime;

ii. Not possessing illegal controlled substances; and,

iii. For any court ordered fine, payment thereof and adherence to any court ordered payment schedule are part of the conditions of probation.

d. 18 U.S.C. § 3563(b) establishes discretionary conditions of probation describing them as "deprivations of liberty and property" which include (parentheticals indicate subsections of § 3563(b)):

i. (1) Support dependents and meet other family responsibilities;

ii. (3) Make restitution pursuant to 18 U.S.C. §§ 3663 and 3664 (without the limitations of § 3663(a)) [The provisions regarding restitution applicable to respondent are covered below];

iii. (4) Give victims of the offense notice pursuant to 18 U.S.C. § 3555;

iv. (5) Work at suitable employment or pursue a course of study or vocational training;

v. (6) Refrain or engage only to a specified limited degree in a specified occupation, business, or profession;

vi. (10) Undergo medical, psychiatric, or psychological treatment and remain in a specified institution if required for that purpose;

vii. (12) Reside at or participate in the program of a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons) for all or part of the term of probation, a period of up to five years pursuant to 18 U.S.C. § 3561(b)(3);

viii. (13) Work in community service;

ix. (20) Remain at home during nonworking hours and have compliance therewith monitored electronically or by telephone. (This condition can only be imposed as an alternative to incarceration);

x. (21) Satisfy other conditions as the court may impose which may include a prohibition on driving for the five year period of probation;

d. 18 U.S.C. § 3571(d) authorizes a fine of among other things twice the pecuniary loss from the offense for any loss by a person other than the defendant;

e. 18 U.S.C. § 3612(f) authorizes the Attorney General to collect interest compounded daily at the one year Treasury bill rate on any fine in excess of $2,500.00;

f. 18 U.S.C. § 3612 authorizes up to a 15 percent penalty of the principal amount of any fine that is in default;

g. 18 U.S.C. § 3612 commands that any judgment ordering a fine (a public record) list the defendants name, social security number, mailing address, and residence address;

h. 18 U.S.C. § 3613 authorizes the Attorney General to obtain a lien on the property of the defendant for the amount of the fine. It remains in force for up to 20 years, is enforceable as a Internal Revenue tax assessment, and is not dischargeable in bankruptcy;

i. 18 U.S.C. § 3614 authorizes the resentencing of a person who has knowingly failed to pay a delinquent fine and authorizes imprisonment of a person who has willfully refused to pay a delinquent fine;

j. 18 U.S.C. § 3663 authorizes restitution as a condition of probation for any losses and medical treatment and related expenses occasioned by the offense as follows:

i. There is no limit on the amount of restitution;

ii. The restitution order is enforceable as a civil judgment in state and federal courts;

iii. The Attorney General may enforce the restitu-

tion order under the enforcement provisions available to it for fines allowing for a 20 year lien, no discharge in bankruptcy, and enforceability as an Internal Revenue tax assessment;

iv. The court may revoke the terms of the defendant's probation for failure to pay the restitution and order incarceration.

REASONS FOR NOT GRANTING THE PETITION

1. The lower court's decision is in accord with this court's decision in *Blanton*.

While the lower court's unpublished decision is terse, it nevertheless states unequivocally that respondent is entitled to a jury trial because of the harsh penalty attached to conviction. That finding squares the case with *Blanton*.

Blanton reviews the historical record of the Supreme Court's attempts to define what particular offenses fall into the category of petty offenses historically not triable by a jury. It concludes that the seriousness of a crime determines whether or not it is triable by a jury. *Id*, at 1292. It found that "the most relevant such criteria [of seriousness] is the severity of the maximum authorized penalty." *Id*, at 1292 (citing *Baldwin v. New York*, 399 U.S. 66, 68, 90 S.Ct. 1886, 1887 (1970)).

By maximum authorized penalty, the *Blanton* court was referring to all penalties the legislature had authorized for conviction of drunk driving. While placing "primary emphasis" on the maximum authorized period of incarceration, the court enumerated and totaled the different sorts of penalties available to the Nevada judge in order to determine if for any one penalty or for any combination of

penalties the defendant would be entitled to a jury trial.

The penalties faced by Blanton were as follows:

a. 6 months incarceration;

b. And/or a fine of up to $1,000.00 with a $200.00 minimum;

c. Automatic suspension of driver's license up to 90 days. A partially restricted license was available after 45 days;

d. Attendance at the defendant's expense at an alcohol abuse education program. The court described the state education program as "*de minimus*".

e. 48 hours of community service while dressed in distinctive garb identifying the person as a drunk driving offender. *Id*. at 1294.

The *Blanton* decision gave the courts the following "standard" by which to review cases for entitlement to a jury trial:

> A defendant is entitled to a jury trial in such circumstances [where the offense is punishable by 6 months or less incarcera tion] only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration are so severe that they clearly reflect a legislative determina tion that the offense is a "serious" one. This standard, albeit somewhat imprecise, should insure the availability of a jury trial in the rare situation where a legisla ture packs an offense it deems "serious" with onerous penalties that none-the-less "do no puncture the six month incarceration line".

Id. at 1293.

The lower court did not spell out the maximum penalties in its ruling, but they were before it. Nachtigal's C.A. Br. 8-11. It was aware that respondent, upon a conviction of driving under the influ-

ence in Yosemite National Park, was faced with sentencing as follows:

a. Incarceration for 6 months in the custody of the Bureau of Prisons;

b. Reside at and participate in a program of community corrections facility maintained by the Bureau of Prisons for a period of up to 5 years as an alternative to incarceration, which is equivalent to imprisonment in severity according the lower court's decision in *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990) and the Sentencing Guidelines, § 5C1.1(e)(2);

c. Not drive for the five year period of probation pursuant to *United States v. Snyder*, 852 F.2d 471, 474 (9th Cir. 1988);

d. Fined $5,000.00 or twice the pecuniary loss caused to someone else by the offense. The court may order it paid over five years with interest at the Treasury bill rate amounting at the time to a total of over $7,000.00. It is enforceable as an IRS tax assessment and not dischargeable in bankruptcy;

e. Ordered to pay restitution in an unlimited amount to the Attorney General, enforceable as an IRS tax assessment, and not dischargeable in bankruptcy;

f. Ordered to pay an unlimited amount for the expenses of alcohol abuse education and any other medical, psychological, psychiatric, and related services;

g. Ordered to work in community service for an unlimited amount of hours, refrain from certain types of work no matter the economic consequences.

Against this backdrop the petitioner complains that the lower

court decision is irreconcilable with and disregards the result and reasoning in *Blanton*. It appears that the only true complaint one might have is about the lower court's lack of rhetoric. Even that complaint should fall on deaf ears because the lower court decision is unpublished and thus not citable as precedent. Circuit Rule 36-3, Ninth Circuit Rules.

2. The lower court's decision finding the penalty to be onerous does not conflict with other court decisions.

None of the decisions cited by petitioner are in conflict with the decision sought for review.

In *United States v. Paternosro*, 966 F.2d 907, 913 (5th Cir. 1992), the court determined that no jury trial was available because the penalty consisted of up to 6 months in prison and "[t]he additional penalties of a $5,000 fine and extended probationary period imposed under 18 U.S.C. § 3571(b)...." If anything, that decision is incorrect because it used the additional penalties imposed instead of those that could be imposed as required by *Blanton*. The petitioner cites other court decisions that conflict with *Blanton* in the same way.

United States v. Bencheck, 926 F.2d 1512 (10th Cir. 1991), does even more mischief. There the defendant was faced with four separate charges arising from one encounter with police for which he could be imprisoned for 24 months. He received no jury trial. The appellate court majority agreed reasoning none was available because the trial judge promised a total of no more than 6 months in jail if the defendant was convicted of all the charges and only imposed 10 days on three concurrent suspended 6 month sentences and probation

for 6 months minus the 10 days. The spirited dissent disagreed finding that the majority had violated the requirements of *Blanton* and should have reversed for a jury trial. *Bencheck, supra*, at 1520-22 (Ebel, Circuit Judge, dissenting.).

The petitioner cites *United States v. Harper*, 946 F.2d 1373 (8th Cir. 1991), cert. denied, 112 S. Ct. 1506 (1992), in support of its position that there exists a conflict among circuits. This is either a case inapposite to petitioner's or again a case in conflict with *Blanton*. The appellate court only reviewed the sentence imposed of 6 months incarceration, $500 fine, and $10 penalty assessment on each of two counts to determine that under *Blanton* no jury trial was necessary. If those were the maximum penalties, then they clearly do not even rise to those available in *Blanton*. If not, that court's analysis violates *Blanton* by failing to take into account the maximum statutory penalties that could be imposed for such wrongs.

The remainder of petitioner's citations for cases that are inconsistent with the instant matter are either likewise inconsistent with *Blanton*, or are one's in which the stated penalties fail to come rationally close in seriousness to those available here, or as in *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990), support respondent contrary to petitioner. In sum, those that do follow *Blanton* do not conflict because petitioner's case follows *Blanton*.

3. The effect of this lower court unpublished decision is at best limited to drunk driving cases.

The petitioner claims far reaching effects of the lower court's decision. Assuming without agreeing that federal trial courts will

grant jury trials in drunk driving cases as a result of this case, the lower court's limited decision allows only that they will do so in drunk driving cases. Contrary to petitioners unsubstantiated claim there will be no increase in jury trials for such matters because before the court's decision they were granting jury trials in drunk driving cases. Thus, there will be no increase in such matters on account of the decision.

Illegal digging for bait and the numerous other C.F.R. provisions cited by petitioner were not addressed by the lower court's decision by virtue of it's limitation to drunk driving. Perhaps it is time for this court to look at the unfettered discretion trial courts have to impose penalties as severe as that could be imposed on respondent. The petitioner's example of six months in jail or five years in a community treatment center, etc., without a jury trial for having a dog on a seven foot leash seems to be what he wants this court to sanction by virtue of his argument. These other provisions of the C.F.R.'s may beg for redress as cruel and unusual punishment and demanding a jury trial, but that matter is not raised here because of the lower court's limited decision.

4. The court should not entertain the petitioners repeated requests for summary reversal of the lower court.

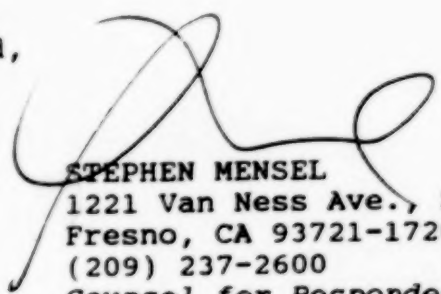
The petitioner asks the court to summarily reverse the lower court. As set out above, if the lower court failed it was by not specifically addressing the petitioners concerns in detail and by merely stating that the penalty available was sufficient to trigger the right to a jury trial. If such detailed findings are necessary, such was not spelled out in *Blanton* and more importantly they seem

unnecessary in this unpublished and therefore nonprecedental decision. If on the other hand this court decides to review the lower court's decision, the brevity of the lower court's decision should not be held against the respondent. Respondent submits that an equitable decision would decline the suggestion for summary reversal and would allowing briefing on the merits in order to properly and fully confront the details and contours of the petitioner's contentions.

CONCLUSION

The petition for writ of certiorari should be denied. The petitioner's suggestion for summary reversal should not be entertained.

Respectfully submitted,



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